83-1970
No. ____

IN THE
Supreme Court of the United States

October Term, 1983

ROY B. HULL, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROY B. HULL, JR.
625 Baker Street
Martinsburg, WV 25401
Telephone: (304) 263-8847

Pro Se Petitioner

88 pp

QUESTIONS PRESENTED

1) Are there limits to what the government is permitted to do, to show a "machine gun" violation;

2) What legal responsibility does a non-owner have, by possessing knowledge of a "weapon" being manufactored by an employee, in obtaining an approved application, for same;

3) In a criminal case, is there a reasonable time prior to trial, that the counsel for the accused is permitted to inspect government's case file againist him and should a written agreement between a key witness for the government be withheld:

4) Is a bonafide national guardsmen, also employed as a Federal Civil Service, Security Officer, in the official performance of his duties, responsible for registering a simulated "machine gun" training aid manufactored for, and donated to the military?

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No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Roy B. Hull, Jr., *Pro Se*, Pray that a Writ of Certiorari issue to review the opinions and judgments from the United States Court of Appeals for the Fourth Circuit filed in these proceedings, dated on March 5, 1984.

OPINIONS BELOW

Appendix A, Ommitted.

The Final Order, U.S. Court of Appeals for The Fourth Circuit, Case No. 83-5057, filed March 5, 1984, is found in Appendix B.

The First Opinion, U.S. Court of Appeals for The Fourth Circuit, Case No. 83-5057, dated October 24, 1983 is found in Appendix C.

The Sentencing Proceedings by U.S. District Court for the Northern District of West Virginia is found in Appendix D.

JURISDICTION

The Final Order, U.S. Court of Appeals for the Fourth Circuit, filed March 5, 1984 (See Appendix B). The Order

by The Supreme Court of The United States, No. A-893, October Term, 1983, extending time to file this petition for Writ of Certiorari to and including June 3, 1984, by the Chief Justice. This Writ was filed on the aforesaid. The jurisdiction of the Court is invoked under 28 U.S.C.§1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Clause 14:

*****

> "Government and Regulation of Land and Naval Forces. To make rules for the government and regulation of the land and naval forces."

*****

Constitution of the United States, First Amendment:

*****

> "Congress shall make no law prohibiting the exercise of religion.

> No religion can be sponsored or favored, none commanded, and none inhibited . . ."

BIBLE

(Numbers 1:2-4) All adult males over the age of 20 must be able to go to war.

*****

Constitution of the United States, Second Amendment:

*****

> "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

*****

Constitution of the United States, Fifth Amendment:

*****

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be

a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

*****

STATEMENT OF FACTS

The facts relevant to the questions presented by this Petition are introduced to the Court in a summary fashion.

The two counts in this case are over-lapped and were, therefore, consolidated. Questions 1 and 4 were alined with Count I, while questions 2 and 3 were alined with Count II, in this Petition.

1. INDICTMENT filed, 8/30/82:

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

v. :: Cr. No. 82-00060-E

ROY B. HULL, JR., Defendant — Violation: Title 26, United States Code, Sections 5861(d), 5861(f), and 5871.

COUNT I

From on or about late September, 1981 to on or about early October, 1981, in Berkeley County, West Virginia, in the Northern Judicial District of West Virginia, ROY B. HULL, JR., did knowingly

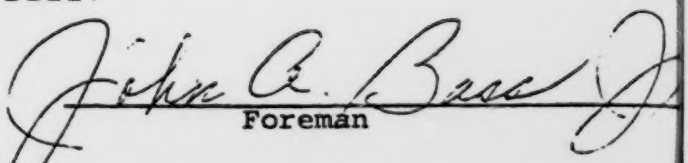
make a firearm, that is a Palmetto Armory .223 caliber machine gun, Serial Number 5818, without having received an approved application as required in Sections 5812(a)(6) and 5822(e), United States Code, in violation of Sections 5861(f) and 5871, Title 26, United States Code.

COUNT II

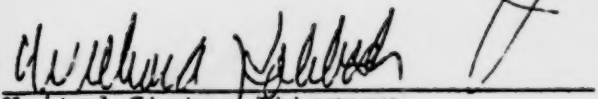
On or about August 10, 1982, in Berkeley County, West Virginia, in the Northern Judicial District of West Virginia, ROY B. HULL, JR., did knowingly possess a firearm, that is, a Colt A.R. 15, Model SP 1, Serial Number SP 38000, lower receiver which had been modified to an M16 machine gun receiver, which is not registered to him in the National Firearms Registration and Transfer Record, as required by Chapter 53, Title 26, United States Code, in violation of Section 5861(d) and 5871, Title 26, United

States Code.

A True Bill:



Foreman



United States Attorney

ARRAIGNMENT proceedings (Magistrate Court presiding): Dft appeared w/o counsel, N/G plea entered by court, pre-trial motions due no later than 10/22/82, PR bond ordered w/bond set at $1,000, 10/12/82.

2. PR bond issued, $1,000, 10/12/82

3. ORDER setting forth actions above at arraignment proceedings 10/12/82 (cert. cy USA, USM, counsel), 10/18/82.

4. MOTION FOR CHANGE OF VENUE filed.

5. REQUEST FOR INFORMATION filed (case file to Lowell), 10/22/82

6. ORDER: Defendant's motion for change of venue denied for reason the Court has scheduled trial in Martinsburg. As to request for information, request granted insofar as all books, documents, papers, photographs or portions thereof which are within possession of U. S. Request for information denied insofar as names and addresses of witnesses to be used on behalf of the U.S. (Copies: USA, counsel), 11/19/82.

7. Defendant's Request for Voir Dire,

12/1/82.

8. JURY VERDICT FILED. Guilty in Cts. 1 and 2, 12/2/82.

9. ORDER: Jury verdict be entered of record and action stayed pending motions or other post-trial proceedings. (Copies: USA, counsel), 12/6/82.

10. MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE NEW TRIAL (copy to Law Clerk Roberts) (jo'l) 12/13/82.

11. Government's Response to Defendant's Motion for Judgment of Acquittal or in the Alternative New Trial. (2 copies USA, box on counter), 12/20/82.

12. Sentencing Hearing, 3/1/83. (Appendix D)

13. MOTION TO MAKE REPORT OF PRESENTENCE INVESTIGATION PART OF THE RECORD. (file to LM), 3/3/83.

14. ORDER: Defendant's Motion denied. (Copies: USA, Wheeling, counsel), 3/7/83.

15. J&C: Deft. ordered to pay fine in amt. of $100.00 plus costs as assessed by the Clerk. (Copies: USA, counsel with pink copy for deft. USA, Whg. USM, Prob.) SF 54, pg. 19, 3/10/83.

16. NOTICE OF APPEAL filed. (Copies: USA, counsel, Deft.) (Copy of notice, docket notations & J&C to 4th Circuit) Transcript Purchase Order to counsel by JB)(Copy of Notice to Sandra Schrader, Business Services, Inc. Hagerstown, Md.), 3/14/83.
Copy 3 - Transcript Purchase Order, Recd.,

3/17/83.

17. Transcript filed, 5/4/83.

18. Brief for Appellant, 7/20/83.

19. Brief for Appellee, 8/10/83.

20. Appellee's Supplemental Appendix, 8/10/83.

21. Reply Brief for Appellant, 8/22/83.

22. Opinion, U.S. Court of Appeals for the Fourth Circuit, 10/24/83. (Appendix C).

23. Second Appeal Brief for Appellant, 11/5/83.

24. Response of Appellee, 1/9/84.

25. Response of Appellant, 1/12/84.

26. Order, for Court to view Exhibits 1 & 2, 2/13/84.

27. Response of Appellee, 2/17/84.

28. Supplemental Response, Appellant, 2/27/84.

29. Second Opinion, U.S. Court of Appeals for Fourth Circuit, 3/5/84 (Appendix B).

30. Motion for 30-day Extension for Petition, Writ of Certiorari, 5/3/84.

31. Order, granting extension No. A-893, 5/4/84.

32. Filing Writ of Certiorari, 6/3/84,

REASONS FOR GRANTING THE WRIT

Petitioner, ROY B. HULL, JR., feels he was wrongfully found guilty by the Jury verdict of two counts; making a machine gune without an approved application; and not registering an isolated modified machine gun lower receiver. That appeals affirming those verdicts failed to consider the extreme testing methods utilized to declare the modified lower receiver, as a machine gun; relevancy of testimony by a government witness, attempting to purge himself from criminal prosecution; withholding Jencks materials from defendant; and lack of prosecutional discretion to prosecute a federal civil service law enforcement Security Supervisor/Chief of Security/ USAF Security Police Supervisor/Air National Guard member, operating on and in accordance with applicable state laws and military directives.

The Petitioner asks this Honorable Court to answer the questions presented.

1) To what lengths may tests be performed by the government on a lower receiver AR15 which is isolated from any other automatic parts required for assembling a machine gun, to show violation of Section 5861(d) and 5871, Title 26, United States Codes;

2) Who is legally responsible for acquiring an approved application to make a machine gun, as required in Sections 5812(a)(6) and 5822(e), United States Code, in violation of Sections 5861(f) and 5871, Title 26, United States Code, an individual who advises and instructs another on how to or the person who actually purchases and acquires items necessary for and in actual possession of such materials, to assemble said weapon;

3) Should not consideration be

entitled to a defendant that was never consulted about and having critical Jencks materials withheld from him prior to and during his actual trial, which prevented impeachment of primary government witnesses under cross-examination;

4) Was it the intention of the United States Congress when passing the 1968 GUN CONTROL ACT, to lay way for prosecution of a bonafide member of the Air National Guard (Security Supervisor, USAF) or Federal Civil Service (Air Technician) Security Officer (Chief of Security) while in performance of his official duties, in a national defense role, to become a violation of Section 5861(d) and 5871, Title 26, United States Code?

COUNT II (Exhibit 2) Question No. 1

.1.a. Though the Petitioner tried to convert a semi-automatic weapon to an automatic for use as a training device, for military personnel under his authority, this attempt was unsuccessful. The weapon never fired full-automatic and was always maintained under strict military control. No government funds were expended in this venture and the former Commander of the base had signed authorizing that weapon and others to be maintained on the installation.

.1.b The frame (lower receiver) was completely stripped of all parts except the upper receiver, the hinge bolt that held the two pieces together, and a semi-automatic carrier. A tab was broken off the trigger housing, making these items junk. Thrown in the top of a locker at the base, which was at least ten miles from the Roberts' residence. Aforesaid

locker was locked with a padlock for which the Petitioner carried the only key. The lower receiver which was maintained in isolation to any full-automatic parts was given freely to BATF Agents on August 10, 1982.

.1.c. BATF weapon expert used a far-fetched manner for testing this weapon. Testing required removing the upper receiver and utilizing all parts except the lower receiver, itself, from Exhibit 1. Manufacturing designs prevented the upper receiver from a M16 to be assembled together with a AR-15 receiver, because connecting pins are off center and of different sizes. The BATF Agent compensated for missing, off center, and different size pins by holding the upper and lower receivers together for testing with his hand. This manner of testing should be classified to extreme, besides being unsafe. (Reference

Appellee's response, Feb. 17, '84, Page 2, paragraph 2):

*****

> "Agent Barnes has indicated in response to Appellant's comments in his Petition, that while there are different diameter holds in the AR-15 and M16 type receivers, this is generally sufficient clearance and adequate alignment to allow the small pin to be used. For the purpose of test firing, a missing or undersized hinge pin can be compensated for by grasping the forward part of the magazine housing with the fingers of the non-shooting hand and by placing the thumb of the same hand over the upper receiver, inside the carrying handle. Appellee contends that construction of the firearm is such that by using the grip of the non-shooting hand in conjunction with the holding action of the take down pin (located in the rear of the receiver), any separation of the upper and lower receiver is easily controlled."

*****

.1.d. Petitioner would submit that any individual owning any over-the-shelf, factory-fresh from the box, semi-automatic weapon, can fall guilty to this manner of testing, for not registering a "machine

gun" whether or not milling is done on the frame.

.1.e. Because this case is so unusual, the primary opinion offered is the in-depth study by Judge J. Gasch, United States District Court, District of Columbia, on August 4, 1980. U.S. v. Seven Misc. Firearms 503 F.Supp. 565.

.1.f. In U.S. v. Seven Misc. Firearms case, the Exhibit 1 was a Colt AR-15 described as "an appropriate museum display piece. Government Exhibit 1 cannot be fired either automatically or semi-automatically or otherwise because of missing parts. . .. . . .further shows that this item was deactivated. . .". Petitioner would like to compare the Exhibit 2 of his trial and substituting "museum" above with "military training aid", all other aforesaid description would hold true, except the Exhibit number. "The Government expert (in that

case), demonstrated how Government's Exhibit No. 1 *could be altered so* that it would shoot automatically. He accomplished this by installing the upper receiver assembly and barrel of a fully operational Colt AR-15, Government Exhibit No. 8, and by installing the complete bolt and carrier, the automatic sear assembly and its retaining pin in Government Exhibit No. 1 with these parts from an operational Colt AR-15 . . .".

.l.g. It appears that the prosecution will venture to any length to deprive Petitioner's rights. Bear in mind that Defendant in this case was Chief of Security over an Air National Guard flying installation. That he always operated with high morals, respect for the law, and a love for his country. Duties of his position primarily included the responsibility of protection of this government military installation. A

threat of terrorist attack was present because similarly Air Guard and Air Force Reserve installations had many of their resources destroyed.

.1.h This Petitioner does not feel he violated any statutes, which were entered againist him in Counts I and II, and is not admitting so with the following theory. It being, that only one weapon can exist at any given time. Parts had to be exchanged between the two weapons (Exhibit 1 and 2), even to allow testing to take place. Thus, it is impossible to have two weapons. The Petitioners rights have been ignored, under the Fifth Amendment U.S. Constution:

*****

"...nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb,..."

*****

.1.i. It is plain to see if the parts were allowed to remain on the Count

II stripped and broken frame, the Jury may not have been tainted, as much. Because unlike the Count I frame, the Count II had to be held together with one hand. This would have made it much harder for the Prosecutor to wave and beat the gun butt on the railing in front of the Jurors. (Reference Appellee's response, Feb. 17, '84, Page 2, paragraphs 1 & 2, inparts)

*****

> "Agent Barnes testified that test fired the Palmetto arms rifle in both the semi-automatic modes of fire, then used parts from the Palmetto on the AR-15 receiver."

*****

> "Agent Barnes has indicated... ...a missing or undersized hinge pin can be compensated for by grasping the forward part of the magazine housing with the fingers of the non-shooting hand and by placing the thumb of the same hand over the upper receiver, inside the carrying handle."

*****

COUNT I (Exhibit 1) Question No. 2

.2.a. Petitioner claims that he only offered free advice to government's witness (Sgt. Victor A. Roberts, III), on how to construct a semi or full automatic M16 rifle. These talks included warnings against a full-automatic. He admits instructing government's witness (Sgt. James G. Thurston), on how much additional metal to mill out from the interior side-walls of Sgt. Roberts' already poorly manufactured full automatic M16 lower receiver, tc accommodate semi-automatic inter operational parts. Further contending that freely expressing limited knowledge of weapons to fellow employees should not be illegal?

.2.b. Then he will state that he gave parts removed from his semi-automatic weapon, which were not controlled under the 1968 Gun Control Act, without charge to Sgt. Roberts. Later he assisted Sgt.

Roberts to assemble an upper receiver, with parts having no difference between those found on either version of AR-15 (semi-automatic) or M16 (full-automatic) weapons.

*****

(TR 68)(12/2/82)

Q. You say you never saw this weapon completely together?

A. Until I came into the Court room yesterday.

*****

.2.c. This Petitioner insists Sgt. Roberts gave false testimony when stating who manufactured this weapon. That he should not be responsible for the parts removed from Sgt. Rogerts' residence and assembled by BATF Agents into a weapon. That most of the larger exterior parts of this weapon were not derived from his former ownership. Because no inspection by defense of the inner parts has pre-

cluded him knowing responsibility for them.

.2.d. As a writer cannot be held responsible for printed or screen viewed materials, which may inspire criminal acts, nor should this Petitioner be prosecuted because Sgt. Roberts failed to apply for authority or registration of a weapon or parts acquired, maintained and controlled at the Roberts' home.

.2.e. That the matter on this Count I is based solely upon the jury in deciding between the conflicting testimony of Sgt. Roberts or your Petitioner, must have preferred the former. During redirect examination the following question and answer was heard by that jury: (TR 22)

*****

Q. Mr. Roberts, did anyone ever promise you that you wouldn't be prosecuted if you came in and testified today?

A. No.

*****

.2.f. But during a January 9, 1984 response of Appellee the following statement was offered:

(Paragraph II.A)

*****

"... (Petition p.3). Appellant had ample opportunity to examine the arrangement between the United States and Mr. Roberts by reviewing the written agreement between the parties, the "Jencks" material, and by a thorough cross-examination of the witness at trial."

*****

.2.g. As this agreement was entered into in October 1982, it appeared Sgt. Roberts had not been told that the Grand Jury, which met two weeks prior, failed to indict him.

.2.h. It is widely recognized in

criminal cases that defense counsel has considerable latitude in cross-examining witnesses for the prosecution for the purpose of showing their motives in testifying. The rule allowing great latitude in the cross-examination by the defense of a witness for the prosecution as to his motive for testifying is especially applicable where such a witness is an accomplice of the defendant. E.g., United States v. Crumley, 565 F.2d 945 (5th Cir. 1978). In the case at bar, Sgt. Roberts was an accomplice of Sgt. Hull.

.2.i. In State v. Brooks, 513 S.W.2d 168 (Mo. 1974), the Missouri Court of Appeals held, in reversing and remanding the case, that there was sufficient testimony, if believed, to support a conviction, but the failure of the prosecution to disclose a proffered favorable disposition of indictments

against one of its witnesses in return for his testimony constituted a denial of due process where the record established a knowing, calculated attempt to foreclose the defendant from eliciting relevant testimony and to keep the jury from having facts upon which to base its determination of the witness's credibility and, therefore, of the defendant's guilt. The Court stated in that case:

> "Human experience teaches that the opportunity to rid oneself of punishment for wrongdoing is a powerful incentive to fabrication, even where the opportunity is presented only if the testimony implicates another. Promises of immunity from prosecution, reduction of charges, reduction of punishment, and dismissal of charges are common methods of obtaining testimony implicating persons other than the witness. This is not to say that testimony obtained by such promises is always untrue or even usually untrue, but human experience teaches that it is always suspect. Whether such promises have been made is an important fact which a jury must have to evaluate the testimony. And the important consideration is not whether a promise or agree-

ment has been made or whether it is carried out, but whether the witness believes or has reason to believe that if he testifies in a particular manner he will receive more favorable treatment."

.2.j. In the case at bar, it is Sgt. Roberts' own testimony which best shows the fear, intimidation, and duress he was under by the prosecution: (TR 18 thru 22)(12/1/82)

*****

Q. They scared you, didn't they?

A. They scared my family. I was more worried about them than anything else.

Q. They scared you out of your wits, didn't they?

A. Not really.

Q. Not really.

A. They worried me but they didn't scare me out of my wits.

Q. Worried your family, didn't they?

A. Very much.

Q. Who came to you from the Department of Alcohol, Tobacco & Firearms?

A. Mr. Pirotte.

Q. When did he first come to you?

A. That day I got back from the beach.

Q. When was that?

A. The same day they took the statement.

Q. What day was that?

A. July 2nd.

Q. 1982?

A. Yes.

Q. You gave them a statement about Mr. Hull, didn't you?

A. Yes, I did.

Q. They told you if you would give them a statement against Sgt. Hull, if you would testify against Sgt. Hull they wouldn't

prosecute you, didn't they?

A. No, they did not.

Q. They didn't prosecute you, did they?

A. Not as of yet.

Q. They told you they had an open and shut case against you, didn't they?

A. I don't recall.

Q. But, they could have, couldn't they?

A. They told my parents that they could put me away for ten (10) years and that's what was reiterated to me on the phone.

Q. That's why you gave them a statement about Sgt. Hull, who just helped you put a gun together so you could protect the base, isn't it? Because you don't want to go to prison for ten (10) years, do you?

A. To me that would be a death sentence.

Q. And, you don't want him to go to prison for ten (10) years either, do you? But you don't have any choice, do you?

A. Not really.

Q. And, you're aware of the fact, aren't you, that the Department of Alcohol, Tobacco & Firearms recommended in their report to the U.S. Attorney's Office on the other side of the state that you also be indicted for several counts of firearms violations, aren't you?

A. No, I did not know that.

Q. They didn't tell you that?

A. They didn't tell me that. After the second conversation I had with ATF, after the second statement I guess you'll see

there in your report I asked them what charges could be brought against me at that time and they finally told me.

Q. What did they tell you charges could be brought against you?

A. Possession of automatic weapon and there were two (2) others. I do have them here in my wallet if you'd like to see them.

*****

.2.k. Petitioner contends that Sgt. Roberts' own testimony bears out the great fear, excessive intimidation, and undue duress he was placed under by the prosecution. Petitioner also testified that the A.T.F. agents terrorized Sgt. Roberts' family and threatened him with going to jail for ten (10) years and a large fine.

.2.l. Sgt. Roberts' testimony was clearly much more than suspect. Sgt. Roberts, who was an accomplice and who

had not been prosecuted "as of yet", but whose parents and he had been told they could put him away for ten (10) years, certainly believed or at lease had every reason to believe that he would receive more favorable treatment for testifying than for not testifying. They had not prosecuted him "as of yet", when they said they could, and they had prosecuted Sgt. Hull.

.2.m. The extreme duress Sgt. Roberts was under was further borne out by his testimony that he had the charges A.T.F. had told him could be brought against him with him on the witness stand in his pocket and could show them. The duress Sgt. Roberts was under could not have been pointed up any better than his testimony that ten (10) years in prison "would be a death sentence" to him and but for that hanging over him he would not have given a statement or testified

for the prosecution.

.2.n. Sgt. Hull takes the position that Sgt. Roberts' testimony was tainted and his credibility was completely compromised by the fear, intimidation, and duress he and his family was placed under by the prosecution, and the District Court committed prejudicial error in not striking all of his testimony and cautioning the jury to totally disregard it. Sgt. Roberts' testimony surely further tainted and prejudiced the jury against Sgt. Hull.

COUNT I (Exhibit 1) Question No. 3

.3.a. Withholding all Jencks materials until one day proceeding (Dec. 1, '82 U.S. D.C. of N. WV) trial. Eighteen (18) hours before trial, the Junior Defense Counsel (Mr. Gray Silver, III.) met with U.S. Assistant Prosecutor (Mr. Thomas O. Mucklow). During this meeting, in Martinsburg, WV, at the Federal Building, prosecutor (Mr. Mucklow) allowed a selected amount of documents, in the government's possession, to be inspected and copied. Most of the evidence "Jencks" materials revealed were statements from government witnesses, which were never called to testify. None of the evidence examined by Junior Defense Counsel offered time for conferring with Defendant. Defense was not adequately equipped to discredit government witness and moreover causing a great degree of false impressions to weigh accused's

defense.

.3.b. Among documents withheld was at least one conflicting statement given by government's witness, Sgt. Victor A. Roberts, III., that did not agree with other statements he had given and a written agreement (deal) which his counsel (Mr. William H. Loy) entered into with U. S. Attorney (Mr. William A. Kolibash) in Wheeling, WV in October, 1982 (Ref. COUNT I (Exhibit 1) Question No. 2 - .2.f, page 24)

.3.c. Senior Defense Counsel (Mr. Clarence E. Martin, Jr.), on October 21, 1982, did request all the foregoing information, in the prescribed manner. The U. S. District Court for Northern West Virginia, denied names and addresses of witnesses in setting forth a written order releasing government documents. While the primary effort of the prosecution appears now for the

government to win, than allowing justice to be served, omitted those aforesaid documents from the Petitioner, and both defense Counsel's inspection.

.3.d. Petitioner's Senior Defense Counsel had a broken shoulder and was not able to travel the 167-mile, one-way trip to Elkins, West Virginia, from Martinsburg, West Virginia, nor did the Junior Defense Counsel have an opporunity, because he did not join that law firm, until just prior to the trial. The Senior Defense Counsel did attempt utilizing an attorney who practiced in Elkins, West Virginia, but the prosecution (Mr. Thomas O. Mucklow) refused to allow that surrogate attorney access to the government's documents and photograph same for mailing to this Petitioner's counsel. (Reference: Affidavit from Senior Defense Counsel, which follows, pages 37 thru 41, having been retyped from original, and was presented to Clerk, for US Supreme Court.)

IN THE SUPREME COURT OF THE UNITED STATES

ROY B. HULL, JR.,

Plaintiff,

v. Criminal No. A-893

UNITED STATES

AFFIDAVIT

STATE OF WEST VIRGINIA

COUNTY OF BERKELEY, to-wit:

Personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, Clarence E. Martin, Jr., an attorney practicing in the City of Martinsburg, Berkeley County, West Virginia, at 119 South College Street, and being duly sworn says:

1. That he is a licensed attorney of the State of West Virginia and has been for almost a period of fifty (50) years.

2. That he was one of the counsel representing Roy B. Hull, Jr. in the above-styled criminal action in the United States District Court for the Northern

District of West Virginia.

3. During the progress of said proceeding he, on the 21st day of October, 1982, filed a Motion seeking discovery of all materials in the hands of the United States Government having to do with the prosecution of the aforesaid Defendant.

4. On the 19th day of November, 1982, the said Court granted the said Motion but only as to the names and addresses of the witnesses known and to be used by the United States Government in the trial of the aforesaid prosecution.

Shortly thereafter, the undersigned suffered a serious injury which prevented him from appearing before the United States District Court in person.

That the headquarters of said Court are in Elkins, West Virginia, and the professional address of the undersigned is Martinsburg, West Virginia, some one hundred sixty five (165) miles distant

from Elkins, West Virginia.

That he employed a lawyer in the town of Elkins, West Virginia, by the name of Joseph Wallace to appear before the United States District Court in person, on behalf of Roy B. Hull, Jr., seeking access to the said materials in the hands of the government which motion was denied although in overruling the previous Motion for Discovery, the Court had ruled the materials sought could be secured by a personal review of the United States Government in the prosecution.

Finally, on the day before the trial of the said Defendant, the Court allowed the undersigned attorney and his associates to review the file and try to secure the material sought but it was too late to build a defense against said information secured.

That he is informed and believes

and therefore alleges that the United States Government had prior thereto entered into an agreement with the prosecuting witness, Victor Roberts, Jr., not to presecute him if he would participate in testifying in said trial on the part of the United States Government which said agreement, if in writing, was never furnished to the said Roy B. Hull, Jr., although he had personally requested the same and the said Victor Roberts, Jr. did testify against him in the trial of the aforesaid criminal action.

The government attempted to indict the said Victor Roberts, Jr. but was unable to do so before the Grant Jury in Elkins, West Virginia, which indicted the said Roy B. Hull, Jr. and that all of the aforesaid activities by the United States Government damaged and greatly hindered him in his defense of the charge against him and as well as prejudiced and dis-

criminated against him.

Further affiant saith not.

Clarence E. Martin Jr.

Taken, subscribed and sworn to before me this 31st day of May, 1984, by Clarence E. Martin Jr.

Janet R. Hamilton

Notary Public

My commission expires:

June 19, 1990

Jencks v. U.S. (1957) 353 U.S. 657, 1103:

*****

HEADNOTES

Discovery and Inspection §13 of documents in government's possession - in criminal case.

3. A defendant in a criminal case is entitled to the production by the government of documents containing statements of government witness where the impeachment of their testimony is singularly important to him, and particularly where the witnesses admit that they cannot remember what reports were oral and what written and one of them does not remember their contents.

[*See annotation references 1, 2*]

Discovery and Inspection §13 of documents in government's possession - in consistent statements.

5. A rule which would require, as a prerequisite to an accused's right to the production of documents in the government's possession, a preliminary showing that statements of government witness with their trial testimony is incomplete with the Supreme Court's standards for the administration of justice in the federal courts.

[*See annotation references 1, 2*]

Criminal Law §1 -- doing justice.

6. The interest of the United States in a criminal prosecution is not that

it shall win a case, but that justice shall be done.

Discovery and Inspection §13 of documents in government's possession - refusal - dismissal.

10. A federal criminal action must be dismissed when the government, on the grounds of privilege, elects not to comply with an order to produce, for admission in evidence, relevant statements or reports in its possession of government witnessess touching the subject matter of their testimony at the trial; the burden is the government's not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential informantion in its possession.

[*See annotation references 3 - 6*]

ANNOTATION REFERENCES

1. Accused's rights to inspection or disclosures of evidence in possession of prosecution, 52 ALR 207.

2. Right of defendant in criminal case to inspection or production of contradictory statement or document of prosecution's witness for purpose of impeaching him, 156 ALR 345.

3. Governmental privilege against disclosure of official information, 95L ed 425 and 97L ed 735.

6. Dismissal of action for failure or refusal of plaintiff to obey court order, 4 ALR2d 348.

*****

.3.e. Note how the following remarks indicate, a "written agreement" did exisit, and after Sgt. Roberts' twice had given perjured testimony, that no agreement was made. (Reference: Appellee's Response, dated: Jan. 9, 1984)

*****

"II.A. Appellant charges that the United States Attorney and O.S.I Agent Denning suborned the perjured testimony of Victor Roberts, III and alleges an oral deal apparently between the United States Attorney and Mr. Robert's father and attorney (Petition p.3). Appellant had ample opportunity to examine the arrangements between the United States and Mr. Roberts by reviewing the written agreement between the parties, the "Jencks" material, and by a thorough cross-examination of the witness at trail."

COUNT I (Exhibit 2) Question 4

.4.a. Petitioner now begs The Honorable Highest Court to explore the real reason for Congress passing such a stringent law as the 1968 Gun Control Act. It was passed right after Bobby Kennedy and Martin Luther King were gunned down. This statute seems to be ambiguous and broadly written, for undermining subversive organized crime, thus ridening our nation to be a safer place for living and raising a family.

.4.b. History has proven that living in a disarmed society can be peaceful and quiet. It also has the appearance of an open invitation to criminals, because of the defenseless ability for those people to stop aggression. "When guns are outlawed only criminals will own guns." (unknown NRA speaker)

.4.c. A well regulated militia, being necessary to the security

of a free state, the right of the people to keep and bear arms shall not be infringed." (Second Amendment, U. S. Constitution) "Militia" according to the definition in use at the time the Constitution was written meant simply "arm citizens" (See definition in any 1828 Noah Webster dictionary). Hence the phrase "of the people," since the only difference between "militia" and "people" in that day was one of armament, not enlistment.

.4.d. Congress had no authority to pass the 1968 Gun Control Act since power not given to Congress was specifically reserved for the States - Amendment 10, U. S. Constitution. e.g., Presser v. Illinois 116 U.S. 252, 265(1886), and United States v. Cruikshank 92 U.S. 542, 553(1876).

.4.e. Under Title 61 of the W.Va. State Code Article 7. Dangerous Weapons

§61-7-3. Exceptions as to prohibition against carrying deadly weapons.

*****

Nothing in this article shall prevent any person from carrying any such weapon as is mentioned in the first section of this article, in good faith and not having felonious purposes, upon his own promises; nor shall anything herein prevent a person from carrying any such weapon, unloaded, from the place of purchase to him home or residence, or to a place of repair and back to his home or residence; nor shall anything herein prevent a guard at the West Virginia penitentiary duly appointed in conformity with section five [§ 28-5-5], article five, chapter twenty-eight of the Code of West Virginia, from carrying any such weapon while on duty; nor shall anything herein prevent a bona fide member of the national guard of West Virginia, or of the reserve officers component of the United States army, while in performance of his official duties as such or any properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this State, or from the United States for the purpose of target practice, from carrying any revolver or pistol mentioned in this article, unloaded, from his home or place of residence to a place of target practice, and from any such place of target practice back to his home or residence,

> or using any such weapon at such place of target practice in training and improving his skill in the use of such weapons; but nothing herein shall be construed to authorize any employee of any person, firm or corporation doing business in this State to carry, on or about the premises of such employer, any such pistol, or other weapons mentioned in this article, for which a license is herein required, without having first obtained the license and given the bond as herein provided.

*****

.4.f. Under Title 61 of the W.Va. State Code, Article 7, §61-7-2. License to carry weapon; how obtained. The Opinion of the WV State Att'y Gen., July 19, 1968:

*****

> "Civilian guards employed by the national guard must have license. --Before civilian guard employed by the national guard to protect air bases may lawfully carry weapons, each must first apply for and obtain a license therefore by following requirements outlined in this section."

*****

.4.g. Petitioner states the

following facts:

(1) He was a bona fide member of West Virginia Air National Guard.

(2) He was enlisted on November 16, 1962 through May 15, 1983.

(3) He was assigned to Security Police, as a Security Supervisor.

(4) He was also employed as a Federal Civil Service (Air Technician) GS-09, Security Office (Chief of Security) from August 1968 through January 22, 1982.

(5) He was responsible among many things written into the National Guard Bureau, Job Description, responsible for:

(a) Enforcement of law and order.

(b) Supervising Security forces assigned.

(c) Providing training aids and assisting in training of assigned personnel.

.4.h. Petitioner has always tried to follow the law to a "T", even acquiring the state gun permits, etc. Had there been any question about a $200 registering fee, he would have done so, because after spending over a $1000 in the State legal system for weapon authorization, what was another $200, in fact, the government would have been obligated to pay the fee for him. In his position of high trust, it required the setting of good example, of high morals and strictly obeying the law.

.4.i. The "frame" given to the BATF Agents on August 10, 1982, was only a broken part, that had been a poor attempt by the Petitioner to construct a simulated "machine gun" training aid, donated by him to the military security personnel assigned under his responsibility for training. The primary weapon, utilized for their assigned mission. Because of the Viet Nam War, the M16 rifles, state side were in short supply

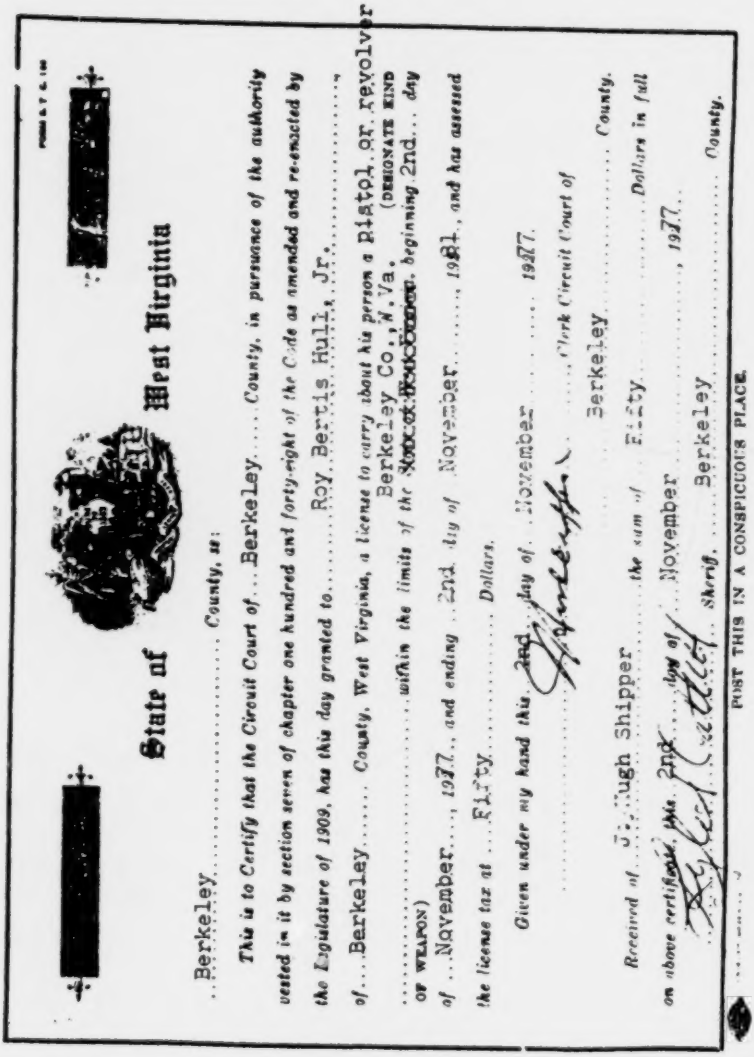
and not available for training in the State of West Virginia. This weapon failed to fire full-automatic and should not have constituted violation of the law. It was during that war, knowing full well that those personnel, including himself, could be called within 48 hours to that aforesaid war area or elsewhere in Europe, where that was the standard issued weapon, which guided the Petitioner. It is then and presently viewed as a direct violation of the Petitioner's rights under the Fifth Amendment because he could have been, "deprived of life, liberty ...".

.4.j. The weapon, or piece thereof, was never a threat to society, it was ordered from and delivered directly to the base; it only left the installation once, and then it was maintained under strict military armed convoy control. On August 10, 1982, there were over 625

of the M16 rifles on that base and the adjoining installation, but, of course, they are complete and fully functional "machine guns". This part was no longer needed, just over looked, it was broken, and would have been destroyed so anyway.

.4.k. Your Petitioner, when being hired as a State Security Guard and then a Federal Service Real Property Technician over base security, by Capt Jimmy O. Bail, WVANG, he showed him a letter from the Att'y Gen., about carring weapons on the Air Field, at Martinsburg MAP, WV, that opinion in aforementioned paragraph .4.f., was the same. Since that opinion was given this Petitioner has always maintained a West Virginia State License. This was before the enactment of the 1968 Gun Control Act and so this Petitioner was never told he required a Federal permit the Court could be assured that he would have gotten one. (See State Lic., pg 53)

Note: The document below is a matter of record, recorded in the Berkeley Co., Martinsburg, WV 25401.



State of West Virginia

Berkeley ..... County, to:

This is to Certify that the Circuit Court of Berkeley ..... County, in pursuance of the authority vested in it by section seven of chapter one hundred and forty-eight of the Code as amended and re-enacted by the Legislature of 1909, has this day granted to ..... Roy Bertis Hull, Jr. .....

of ... Berkeley ..... County, West Virginia, a license to carry about his person a pistol or revolver (DESIGNATE KIND OR WEAPON) of ... November ..., 1977, and ending 2nd day of November ..., 1981, and has assessed the license tax at ... Fifty ..... Dollars.

Berkeley Co., W.Va. beginning 2nd ... day

Given under my hand this 2nd day of November ..., 1977.

..... Clerk Circuit Court of

Berkeley ..... County.

Received of ... Hugh Shipper ..... the sum of ... Fifty ..... Dollars in full on above certificate, this 2nd day of November ..., 1977.

..... Sheriff. ..... Berkeley ..... County.

POST THIS IN A CONSPICUOUS PLACE.

Note: Above document reduced to one-half orginial size, with the orginial to be presented to the U.S. Supreme Court, at time filing this Writ.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 38 of the Rules of The Supreme Court for the United States, Petitioner requests oral argument, by his designated counsel, for the reasons that he presently stands convicted on two (2) felony charges, the closeness of the questions involved in this technical case, the very broadly written statute involved in this case, and the decisional process would be significantly aided by oral argument.

CONCLUSION

We would respectfully ask this Court to carefully read Judge Maxwell's remarks (found in Appendix D, enclosed) at the sentencing hearing to more fully appreciate the flavor of this case. It is pertinent that Judge Maxwell, the trial judge, had the opportunity to sit throughout the entire trial of this case and observe all of the witnesses both for the

prosecution and the defense. He was in the best position to review the merits of this case and he strongly criticized its prosecution as lack of prosecutorial discretion of a very close and technical case under a broad and ambiguous statute, sentenced Petitioner to only a $100.00 fine, and encouraged him to appeal.

We would also ask the Court to consider Judge Maxwell's remarks that the intent of Congress was not carried out in prosecuting this case in which there was not a criminal subversive organized crime type of mentality involved, but only an effort by Petitioner and his associates of security of a national facility.

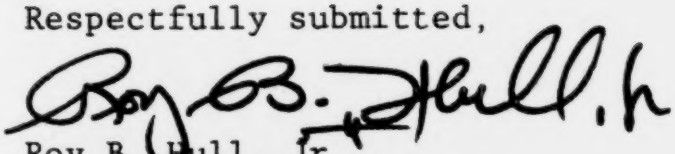
We would further ask the Court to consider that both the Government's investigating agent and expert witness blatantly misrepresented the law in testifying that the lower receiver of both

Sgt. Roberts' parts and Petitioner's parts, alone, was a machine gun under the definition of the Gun Control Act. Also, the Government's expert witness by his own testimony materially altered both Sgt. Roberts' parts and Petitioner's parts and never fired either of them fully automatic in the same condition as they were respectively taken into possession.

WHEREFORE, based on the foregoing arguments, Petitioner respectfully prays that this Honorable Court reverse the District Court's denial of his Motion for Judgment of Acquittal or in the Alternative New Trial, and the District Court's Judgment and Probation/Commitment Order adjudging him guilty as charged and convicted, and direct entry of judgment for him, or, in the alternative, grant a new trial.

DATED: June 3, 1984

Respectfully submitted,



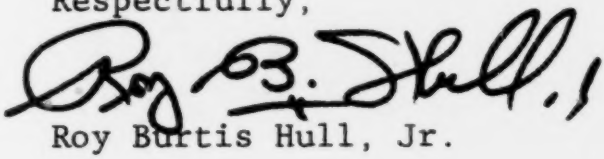
Roy B. Hull, Jr.
625 Baker Street
Martinsburg, West Virginia 25401
Telephone: (304) 263-8847
Petitioner, Pro Se

PRO SE OATH

I, Roy Burtis Hull, Jr., SSAN NO: 223-60-5901, do solemnly swear (or affirm) that as a Petitioner of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States of America.

Dated: June 3, 1984.

Respectfully,



Roy Burtis Hull, Jr.

Clarence E. Martin, Jr., Esquire
(Counsel Contracted for Oral Argument)
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APPENDIXES

APPENDIX A OMITTED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-5057

UNITED STATES OF AMERICA, Appellee,

vs.

Roy B. Hull, Jr., Appellant.

O R D E R

This Court affirmed the two-count conviction of Roy B. Hull, Jr. for violation of 26 U.S.C. § 5841 et seq. (Registration of firearms) in a per curiam opinion entered on October 24, 1983. After reviewing the appellate briefs and appendix, and mindful of the earnest and repeated efforts of Hull to obtain rehearing, members of the Court viewed the firearms in question during

the week of February 6, 1984 in Richmond, Virginia.

Review of the record and viewing of the firearms convince the panel that sufficient evidence was presented at trial to justify Hull's conviction. Specifically, a broad construction of the word "machine gun" under 26 U.S.C. § 5845(b) does encompass frames and receivers milled to fire in an automatic fashion, which would serve to validate Hull's conviction on both counts.

Hull's Petition for Rehearing is thus denied.

It is so ordered this 1st day of March, 1984, with the concurrences of Judge Ervin and Judge Butzner.

Francis D. Murnaghan, Jr.
United States Circuit Judge

UNPUBLISHED

C-1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-5057

United States of America,

Appellee,

v.

Roy B. Hull, Jr.,

Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, District Judge CR 82-00060-E

Submitted: September 22, 1983

Decided: October 24, 1983

Before MURNAGHAN and ERVIN, Circuit Judges and BUTZNER, Senior Circuit Judge

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PER CURIAM:

Roy Hull seeks to appeal from his federal conviction for firearms violations. Hull was convicted of two offenses involving unregistered machine guns. The critical issue in the appeal is what constitutes a machine gun. The definition of machine gun is found in 26 U.S.C. § 5485(b), which provides:

> (b) Machine gun - The term "machine gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machine gun, and any combination of parts from which a machine gun can be assembled if such parts are in the possession or under the control of a person.

There are two interpretations of the second sentence. One court has held that a machine gun is composed of all three elements listed. United States v. Seven

Miscellaneous Firearms, 503 F.Supp. 565 (D.D.C. 1980). The second approach reads the definition as requiring any one of the three elements to be present. United States v. Kelly, 548 F.Supp. 1130 (E.D.Pa. 1982).

We favor the latter reasoning. Not only does it make more sense, or else the first two clauses are unnecessary, but the legislative history cited in Kelly supports this view. See also United States v. McCauley, 601 F.2d 336 (8th Cir. 1979); United States v. Campbell, 427 F.2d 892 (45th Cir. 1970).

Under this interpretation, Hull's challenges to the sufficiency of the evidence against him must fail. He clearly possessed unregistered machine gun parts. We have considered the remaining assignments of error and found them to be without merit.

We dispense with oral argument as

the facts and legal issues are adequately presented in the briefs and record.

AFFIRMED

(Petitioners copy unsigned)

P R O C E E D I N G S

THE COURT: The next matter we have scheduled is United States v. Roy B. Hull, Jr.

The defense has filed a motion -- post trial motion, either for a judgment of acquittal under Rules 29 and 33 of the Federal Rules of Civil Procedure, or in the alternative, to grant a new trial in this matter.

The defense have very ably set forth 19 grounds in support of the motion that has been presented to the Court. And the Government has responded to it. And the Court has given great consideration to each of the grounds raised and suggested in this matter.

The Court has been very careful in its evaluation of this charge, because it has been a very close case.

The Court will not reiterrate

all of the evidence we got into during the extensive trial held in this matter. But it is a very close case and applying a very broadly written and somewhat loosely connected statute of essential elements creating an offense.

But after reviewing all of the evidence in the case, there is here, a technical, at least, violation of the statute as is alleged in the indictment.

The two counts of this indictment were very thoroughly developed, the Court believes, by the United States in its testimony. And was very, very thoroughly countered by the defense in cross-examination and in the direct testimony as presented by the defense.

Many of the questions and the issues that were presented in this case were matters that were very fully and very much developed factually by able

counsel for either side of this litigation. And they became good, substantial jury questions.

The jury, under instructions that the Court believes were sufficient and satisfactory to properly frame the reference of law and of fact to the jury, made their determination.

So, the Court recognizing that this is a very close case and recognizing that it is more of a technical case than it is of substance, but nonetheless is required to follow the law as set down by Acts of Congress, would overrule the motion of the defendant for judgment of acquittal, or for a new trial.

We can now proceed on to judgment in this case. And speaking of technicalities. This weapon perhaps was never made into a fully automatic weapon. Maybe it is a question of fact as we view it

from the standpoint of the defendant.

As we view it from the standpoint of the defendant, the weapon perhaps was made fully automatic, a fully automatic weapon by the agents who assembled the parts and put it together and found it to be an automatic weapon.

It would just be as much of a technical violation of the statute if that were the facts of the matter and the jury must resolved the facts, not the Court, for the agents to have put the thing together and made it an automatic weapon as it would be to buy the parts and have them available for assembly.

So, you can see the very closeness of the question that was here involved.

So, whether the weapon was altered to fire automatically by the defendant or by the agents, or made

available or what have you -- the sum and substance of the litigation, the Court is convinced, is that there was not a criminal subversive organized crime type of mentality involved in this matter at all. It was, as the Court has said, a technical violation.

The object of the effort by the defendant and his associates, was of security of a national facility. But, in a very loosely and broadly worded statute, there is a violation. So the Court has no alternative when the facts have been submitted to a jury, as they were, and the findings were as they were, but to uphold that verdict and judgment of the jury.

All right. Mr. Hull, if you would come on before the Court, we are prepared to proceed on with judgment in your case.

You have received and have had

an opportunity to go over the presentence report with your attorneys?

MR. HULL: Yes, sir.

THE COURT: Before the Court proceeds on to judgment, Mr. Hull, is there anything you would like to have the Court know as to either why judgment should not be imposed or in mitigation of judgment?

MR. HULL: Well, sir, I think you said it already. I mean -- it's -- it's a technical violation. I really didn't feel that I was doing anything actually wrong.

I thought I was just trying to do my job as best I could. And evidently in this, I've broken a law. I beg the Court's indulgence in this matter. And I am sure that you have given it a lot of consideration and I am awaiting your sentence.

THE COURT: All right, gentle-

men, would you like to say anything?

MR. MARTIN: Your Honor, I would like to call the Court's specific attention to the recommendations made by his ex-commanding officer and by his comrades in arms in the Guard. And the fact that he was not aware that he was breaking the law.

He didn't hurt anybody. And he didn't cause any damage or harm to anybody or any government property. It was not the government's property.

I personally feel, as the Court does or has stated, the statute is very ambigious and as a matter of fact, I don't agree with it, but that has nothing to do with it.

THE COURT: Yes, it's out of our hands.

MR. MARTIN: Yes. I feel that what he has been charged with is actually now something that is permitted. And

there would not be any crime attached to it. And this is by regulation, I think, that has come about.

I think the Court should take that into consideration. And I am sure that there are thousands of weapons in this country that we know nothing about, that are automatic weapons, that were picked off the beaches in the Pacific because I was there and I saw them picked up and brought home. And nobody every accounted for them. I am sure of that, because I was there during the invasion and I saw them picked up after the invasions were over.

So, I don't think he has caused any harm to his country. If he had, I would be the first to admit that. And I would have him throw himself upon the mercy of the Court, your Honor.

THE COURT: All right, sir. Mr. Silver?

MR. SILER: I believe that Mr. Martin has covered all of our grounds.

THE COURT: All right, Mr. Mucklow?

MR. MUCKLOW: Your Honor, first of all, it would be the government's position that we find that Mr. Ancell's report is certainly accurate, most complete, and we feel that it properly reflects both the government's position and that of the defendant.

I would, however, your Honor, like to make a brief comment as to what is contained as the defendant's version and the defendant's position and the comments briefly made by Mr. Martin.

Throughout the entire report from the defendant's point of view and the exhibits as attached, it appears to be an indictment of the United States Government, an indictment of the United States Attorney's Office and an indictment of

the Alcohol, Tobacco and Firearms Bureau.

Your Honor, it is the government's position to uphold the law. And it is the duty of the Alcohol, Tobacco and Firearms Office to seek out and to investigate and to bring to prosecution, those violations of our nation's statutes.

I would agree with Mr. Martin that there are thousands of firearms out there either from the beaches of the South Pacific or from the rice paddies of Viet Nam, which we do not know anything about. These weapons are just as dangerous and just as much a detriment to this country's safety as are the weapons made by Mr. Hull. In that the unauthorized and uncontrolled production of automatic weapons is a threat to the life and liberty of every citizen of this country, no matter who makes them or what purpose they are made for.

While the government well

understands Mr. Hull's ideals and intentions, and his obvious --

THE COURT: -- are you going to bring charges against the agents that put this gun together and made it actually fire automatically?

MR. MUCKLOW: Your Honor, that was pursuant to an investigation and pursuant to testing this weapon. Which I believe the agents are authorized to do under their powers of investigation.

THE COURT: And the defense of an air base is not?

MR. MUCKLOW: Your Honor, Mr. Hull was not authorized to possess such a weapon, though.

THE COURT: But this was in pieces when your agents picked it up.

MR. MUCKLOW: Yes, your Honor, but --

THE COURT: -- they put it together. Is that a technical violation

under this ambiguous statute?

Now, you're talking about upholding the law. You've got to use some prosecutorial discretion, don't you think?

MR. MUCKLOW: Yes, your Honor. But the agents of the Alcohol, Tobacco and Firearms were not making this weapon -- the weapon was already made. The lower receiver, as was brought out, and I don't wish to argue the entire case before the Court at this time, but the lower receiver had already been milled out and was in violation of the statute at that time.

THE COURT: Well, the Court is going to take a very close look at these cases in the future; very close look. And we expect the United States Attorney's Office to take a very close look at them to make sure that the full intent of Congress is carried out. And to make sure that these cases -- the law was passed for a very valid and a very

proper purpose. It wasn't passed for making brownie points. And we know what we are talking about on brownie points as we think of these investigations and some of the things that have happened before and since.

See, the Court keeps track of these cases, not just when they end here, but the Court keeps track of them when they are on probation and on supervision. And some of the things that have occurred on that supervision are shocking and astounding to the Court. And we are going to have this matter very thoroughly looked into.

On this matter, our probation officer, for example, when he talks about buying the parts. Our probation officer, just in his investigation of this in looking at the Shotgun News for example, has marked just page, after page after page, where these various items are all

for sale in a publication of mass circulation. And there is no requirement as to licensing and no requirements or restrictions or what have you. He came across a magazine that I never heard of, "Soldier of Fortune". This is January of 1983, and it is just riddled with advertisements and things of this nature, that are called violations. Maybe they are.

But it seems that something is amiss in this matter.

Well, in this case, the facts have been resolved by a jury. The Court has looked to the broad perimiters of the statute that is involved and has found there is a technical violation involved.

It will be the judgment of the Court that the defendant not be imprisoned in this matter and not be placed on probation. But be fined the sum total of $100 and the costs as to be taxed by the

clerk of the court.

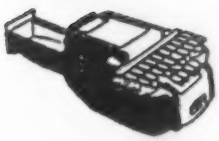
It is such a close case -- just a technical case and is a good case that a court of appeals should have the opportunity of looking at it and I would invite you to take the matter to the United States Court of Appeals for the Fourth Circuit.

Under Rule 32, it is the Court's obligations to advise you that you have that right of appeal and that if you do not have funds with which to proceed on your own, you can procees in forma pauperis. Your attorneys and the clerk of court will assist you in the filing of your notice of appeal. We will assist you in proceeding on with this.

The Court would encourage you in this case -- this -- we need to get some solid law in applying this statute to circumstances such as this. All right. That will be all.

(Whereupon, this concluded this matter at this time.)

(Petitioner's copy unsigned)



John G. Bell
Registered Professional Reporter
P.O. Box 490
Elkins, West Virginia 26241

No. 83 - 1970

IN THE

Supreme Court of the United States

October Term, 1984

ROY B. HULL, JR.,

Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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625 Baker Street
Martinsburg, WV 25401
Telephone: (304) 263-8847

Pro Se Petitioner

25pp

SUPPLEMENTAL

-TABLE OF AUTHORTIES-

Cases

Constitution

-STATEMENT OF FACTS-

-REASONS FOR GRANTING THE WRIT-

-CONCLUSION-

No. 83 - 1970

IN THE

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ROY B. HULL, JR.,

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V.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, pro se, respectfully requests the enclosed supplemental brief be added in support of his foregoing petition for a Writ of Certiorari. A proper case background had been previously overlooked. Also an opinion from another case which directly conflicts with petitioners right to justice. This decision now offered was not previously sited in foregoing motions to the United States Court of Appeals for the Fourth Circuit.

-STATEMENT OF FACTS-

Background preparation of case:

On September 30, 1982, an Indictment was filed in the Clerk's Office of the United States District Court for the Northern District of West Virginia at Elkins by the United States Attorney's Office for said Northern District charging Roy B. Hull, Jr., Sergeant and Chief of Security at the Air National Guard Base, Martinsburg, West Virginia (hereinafter referred to as the ANG Base), with two (2) counts of firearms violations. Count I of the Indictment charged Sgt. Hull with making a Palmetto Armory .223 caliber machinegun without an application, and Count II charged him with possessing a Colt AR-15 lower receiver which had been modified to a machinegun receiver without having registered it. (ref. pgs 6 & 7 of orginal petition)

Sgt. Hull was arraigned on October 12, 1982, at which time he entered a not guilty

plea and a personal recognizance bond was ordered without bond set at $1,000.00.

The jury trial of this case was held on December 1 and 2, 1982, with the Honorable Robert E. Maxwell, United States District Judge, presiding at Martinsburg, West Virginia. The prosecution's witnesses were Victor Roberts, III, security guard at the ANG Base, James G. Thurston, machinist at the ANG Base, James Robert May, security guard at the ANG Base, Steven J. Pirotte, Special Agent with the BATF, and Robert Barnes, Senior Firearms Enforcement Officer Firearms Specialist with BATF. Colonel Joseph T. Crane, retired Detachment and Base Commander of the ANG Base, Colonel Gaines M. Timberlake, retired Chief of Support Services and Combat Support Squadron Commander of the ANG Base, and Sgt Hull testified for the defense.

At the conclusion of the trial, the jury returned a verdict of guilty to both

Count I and Count II. Judge Maxwell then ordered a presentence investigation. Subsequently, Sqt Hull filed a Motion for Judgment of Acquittal or in the Alternative New Trial to which prosecution responded.

A hearing was held on March 1, 1983, at which time Judge Maxwell denied Sgt. Hull's Motion. However, Judge Maxwell, in a very strongly worded attack on the U.S. Attorney's prosecution of this particular case, severely criticized the U.S. Attorney for lack of prosecutorial discretion and failure to carry out the intent of Congress in prosecuting a very close and perhaps technical violation under a very broadly written and loosely connected statute. Saying it seemed something was amiss in this matter, Judge Maxwell then imposed judgment that Sgt. Hull not be imprisoned, not be placed on probation, but fined the sum total of $100.00 and costs. Judge Maxwell further invited and encouraged Sgt.

Hull to appeal this case to the United States Court of Appeals for the Fourth Circuit to obtain some solid law in applying the statute in a question to circumstances such as this.

Sgt. Hull appealed from the United States District Court's Judgment and Probation/Commitment Order denying his Motion for Judgment of Acquittal or in the Alternative New Trial and adjudging him guilty as charged and convicted, to the United States Court of Appeals for the Fourth Circuit.

On October 24, 1983, Sgt. Hull's appeal was affirmed in favor of the lower Court, stating "Under this interpretation, Hull's challenges to the sufficeincy of the evidence against him must fail. He clearly possesed unregistered machine gun parts. We have considered the remaining assignments of error and found them to be without merit." Decided before Judges

MURNAGHAN and ERVIN, and Senior Circuit Judge BUTZNER.

On March 5, 1984, Sgt. Hull's second appeal was also affirmed in favor of the lower Court, stating, "Hull's Petition for Rehearing is thus denied.

A Motion for 30-day Extension for Petition, Writ of Certiorari, filed on May 3, 1984.

Order, granting extension No. A-893, on May 4, 1984, by Chief Justice.

Filing Writ of Certiorari, June 3, 1984, that Solicitor General waived reply.

Filing Supplemental in Support of Writ of Certiorari, August 31, 1984, with service statement for the three (3) copies to Solicitor General, dated August 31, 1984.

[Note: Statement of the Case was overlooked in *pro se's* orginal petition.]

-REASONS FOR GRANTING THE WRIT-

Additional discovery of exculpatory evidence (Brady rule):

Withholding evidence of a deal or agreement, between government's witness Victor Roberts, III, and the Assistant United States Attorney (Mr. Thomas O. Mucklow).

On October 21, 1982, Senior Defense Counsel (Mr. Clarence E. Martin, Jr.), requested disclosure of evidence in the prescribed foremat of documents, copies of evidence, tests, etc., in government's files against petitioner. A select few were released eighteen (18) hours prior to trial, but NOT among these was one conflicting statement given by, nor disclosure of an IMMUNITY BARGAIN, both involving government's witness Victor Roberts, III.

During petitioners appeal efforts that Assistant United States Attornery (Mr. Thomas O. Mucklow) did so reply in

his response dated January 9, 1984, to the U.S. Court of Appeals for the Fourth Circuit, refering to Sgt. Hull's remark, he answered in the following manner:

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"...(Petition p.3). Appellant had ample opportunity to examine the arrangement between the United States and Mr. Roberts by reviewing the written agreement between the parties, the "Jencks" material, and by a thorough cross-examination of the witness at trial."

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During Assistant United States Attorney's (Mr. Thomas O. Mucklow) re-cross-examination at trial he asked the following question of government's witness Victor Roberts, III, and got this answer:

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[Trial Testimony page 22]

Q Mr. Roberts, did anyone ever promise you that you wouldn't be prosecuted if you can in and testified today?

A No.

*****

Was it a play on words or a attempt to secure key government's only witness to testify against Sgt. Hull? While the weapon was found at Victor Roberts' home and the only link to Sgt. Hull being the owner, was Victor Roberts. Had the prosecution disclosed the written agreement with Roberts, the jury could not have found Sgt. Hull Guilty.

Other government witness, such as the BATF Agents, told only of weapon testing, of said weapon, not to who had ownership. When witnesses Thurston and May were on the stand they were only able to state that a weapon existed, not to ownership. Because a deliberate deception of the court took place it incompatible to Sgt. Hull's rights.

In the February 24, 1972 opinion by Chief Justice BURGER, refering to Giglio v. United States (1972) 405 US 150, 31 L Ed 2d 104, is as follows:

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SUMMARY

Pending appeal of a forgery conviction in the United States Court of Appeals for the Second Circuit, defense counsel discovered new evidence that an Assistant United States Attorney, the first to deal with the accused's coconspirator, promised the coconspirator that he would not be prosecuted if he testified for the government. The government's case depended almost entirely on the coconspirator's testimony. The District Court, in denying the accused's motion for a new trial, ruled that the promise by the Assistant United States Attorney was unauthorized and that its disclosure to the jury would not have affected its verdict. The Second Circuit affirmed.

On certiorari, the United States Supreme Court reversed the judgment of conviction and remanded the case for a new trial. In an opinion by BURGER, ch. J., expressing the unanimous views of the court, it was held that (1) the Assistant United States Attorney's

promise was attributable to the government; (2) evidence of the agreement or understanding was relevant to the coconspiritor's credibility; and (3) the nondisclosure of this evidence affecting the conconspiritor's credibility violated due process and justified a new trial, irrespective of the government's good faith or bad faith.

POWELL and REHNQUIST, JJ., did not participate.

Briefs of Counsel, p 839, infra.

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HEADNOTES

Constitutional Law § 840 — due process — known false evidence

1. Deliberate deception of a court and jurors in a criminal case by the presentation of known false evidence is incompatible with the rudimentary demands of justice.

Constitutional Law § 840 — due process — false evidence

2. A conviction secured by the use of false evidence must fall under the due process clause where the state, although not soliciting the false evidence, allows it to go uncorrected when it appears.

Constitutional Law § 840 — material evidence — suppression

3. Under the due process clause, the prosecution's suppression of material evidence justifies a new trial irrespective of the prosecution's good faith or bad faith.

Constitutional Law § 840 — evidence — nondisclosure

4. When the reliability of a given witness may well be determinative of guilt or innocence, the prosecution's nondisclosure of evidence affecting credibility justifies a new trial, under the due process clause, irrespective of the prosecution's good faith or bad faith.

Constitutional Law § 840 — due process — suppressed evidence

5. The due process clause does not automatically require a new trial whenever the combing of the prosecutor's files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict; a finding of materially of the evidence is required.

Constitutional Law § 840 — due process — false evidence

6. Under the due process clause, a new trial is required in a criminal case if false testimony introduced by the state, and allowed to go uncorrected when it appeared, could in any reasonable likelihood have effected the judgment of the jury.

Constitutional Law § 840 — promise of nonprosecution — disclosure

7. In determining whether due process requires a new trial because of an Assistant United States Attorney's promise to a coconspirator that he would not be prosecuted if he testified as a government witness against his coconspirator, and the government's failure to disclose this promise, neither the Assistant United States Attorney's authority nor his failure to inform his

superiors or his associates is controlling; moreover, whether the nondisclosure was a result of negligence or design, it is the prosecutor's responsibility.

United States § 54 — United States Attorneys — powers

8. The United States Attorney's office is an entity and as such it is the government's spokesman; a promise of nonprosecution made to an Assistant United States Attorney must be attributed, for these purposes, to the government.

Witnesses § 95 — evidence — promise to coconspirator

9. Evidence of any understanding or agreement as to a future prosecution of a coconspirator on whose testimony the government's case almost entirely depends is relevant to his credibility, and the jury is entitled to know of it.

Constitutional Law § 840 — due process — promise to coconspirator

10. Due process requires the reversal of a judgment of conviction and a remand for a new trial, where the government failed to disclose its promise to the accused's coconspirator, upon whose testimony the government's case almost entirely depended, that he would not be prosecuted if he testified for the government.

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[Reference: 9 Fed Proc, L Ed § 22:708 page 321]

Generally; Brady rule

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Although the prosecutor has no duty

to provide defense counsel with unlimited discovery of everthing known by the prosecutor, under the Brady rule the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

If a defense request for information presents a substantial basis for claiming materiality, the prosecutor must respond either by furnishing the information or by submitting the issue to the trial judge.

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§ 22:709. Standard for assessing effect of nondisclosure

The Brady Rule applies in three different situations:

(1) If the undisclosed evidence demonstrates that the prosecution knew, or should have known, of the perjury, a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

(2) If the defense has made a pretrial request for specific evidence, the suppression by the prosecutor of such evidence deprives the accused of due process, if the suppressed evidence might have affected the outcome of the trial.

(3) If only a general request for Brady material has been made, or no request has been made at all, the prosecutor's suppression of plainly exculpatory evidence warrants a new trial if the omission results in a denial of the accused's right

to a fair trial by removing a reasonable doubt which would otherwise exist, but if it merely might have affected the outcome of the trial. The accused need not demonstrate, however, that the newly discovered suppressed evidence would have resulted in an acquittal.

Evidence not disclosed by the prosecution is not sufficient to raise a reasonable doubt

—if the evidence not disclosed is in fact inculpatory.

—if the evidence not disclosed is inconclusive.

—if the evidence supporting the conviction is overwhelming.

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§ 22:710. Necessity of defense request

Exculpatory evidence may be obviously of such substantial value to the defense that elementary fairness will require that it be disclosed even without the defense making a specific request. Indeed, fór purposes of an accused's right to a fair trial under the Due Process Clause of the Fifth Amendment, a prosecutor has a constitutional duty to volunteer exculpatory matter to the defense, although a prosecutor does not violate the duty unless his omission is of sufficient significance to result in denial of the defendant's right to a fair trial. If the government has any doubt about the discoverability of evidence not requested it should submit the material to the court for in camera review.

A defense request serves to flag the importance of the evidence to a defense and thus imposes on the prosecutor a

duty to make a careful check of the files. It is within the court's discretion to deny a dragnet motion for the production of all the evidence favorable to the accused. A request is specific enough if, for example, it asks for all promises made to a witness and all actions undertaken on that witness' behalf or at that witness' request, and it need not identify certain documents by date or by addressee.

Although the defense cannot be expected to specify in advance exculpatory evidence that is unknown to the defense, the prosecution faces a similar dilemma in that without a preview of proposed defense it may be uncertain which material from its files is exculpatory.

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§ 22:711. Omission by prosecutor; duty to seek exculpatory evidence

The duty of the prosecutor to volunteer exculpatory matter to the defense is not measured by the moral culpability or willfulness of the prosecutor; the error resulting from nondisclosure of evidence is due to the character of the evidence, not the character of the prosecutor. Nonetheless, it has been held that dismissal of the indictment is the only remedy available when the government deliberately and in bad faith destroys exculpatory evidence. On the other hand, the prosecutor's negligent failure to disclose exculpatory evidence requires reversal only if there was a significant chance that the added evidence could have induced reasonable doubt in the minds of enough jurors to avoid conviction. A prosecutor may be excused if he did not

know of certain evidence, unless he should have known about the evidence.

The prosecutor is not obliged to conduct an investigation to discover information which it does not possess in order to provide the defense with exculpatory evidence. But the prosecutor is obliged to send out requests to other government agencies involved in the prosecution for exculpatory evidence in their files of which the prosecutory is not yet aware.

§ 22:712. Effect of defense negligence

The prosecution's failure to disclose exculpatory evidence is not excused by the contention that diligent defense counsel might have discovered the information on his own with sufficient research. But if defense counsel has learned the information before trial, and negligently fails to follow up on cross-examination or the presentation of its case, the prosecution's failure to make an official disclosure of the evidence does not violate the Brady Rule.

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§ 22:717. Other items

Federal criminal convictions have been overturned due to the prosecution's failure to disclose to the defense—

—physical evidence.

—immunity bargains with government witness, although it need not be disclosed until prior to such witness' testimony.

—prior criminal records of government witnesses.

—other evidence bearing on the credibility of government witnesses.

—pretrial statements of government witness, before the disclosure allowed by the Jencks Act, if required as a matter of due process to permit the accused to prepare an effective defense.

—pretrial statements and the names and addresses of witnesses whom the government does not intend to call, although the prosecution is under no duty to search for witness favorable to the defense.

—pretrial statements and criminal records of coconspirators and codefendants.

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[Reference: Opinion issued by Justice DOUGLAS in the Brady v. Maryland (1963) 373 US 83, 10 L Ed 2d 215]

"In an opinion by DOUGLAS, J., expressing the view of six members of the Court, it was held that (1) the prosecution's suppression of the accomplice's confession violated the due process clause of the Fourteenth Amendment, but (2) neither that clause nor the equal protection clause of that amendment was violated by restricting the new trial to the question of punishment."

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-CONCLUSION-

Regardless of the lack of intent to lie on the part of the witness, various courts have attempted to set forth general guidlines as to when the prosecutor must seek to "correct" his witness' testimony. [Reference Brady rule] This Assistant U.S. Attorney has displayed bad faith, in the failure to "correct" key government witness' Victor Roberts', III testimony. As outlined petitioner now has the right to a New Trial.

As pointed out by the Trial Judge, "a very loosely and broadly worded statute, there is a violation. So the Court has no alternative when the facts have been submittec to a jury, as they were, and the findings were as they were, but to uphold that verdict and judgment of the jury."

Petitioner knew all along that governments' witness, Victor Roberts, was backed into a corner, and trying the only way left open to him, to not be placed in prison for

ten (10) years, was to lie. When the offer of a little leniency came along, that guy would have mislead anyone. By saying Sgt. Hull did it, he removed blame from himself. Is it any wonder he said what he did? Had he told the truth, the jury would have found Sgt. Hull, NOT GUILTY, but Roberts would have been brought to trial later for that very crime which he was trying so very hard to avoid.

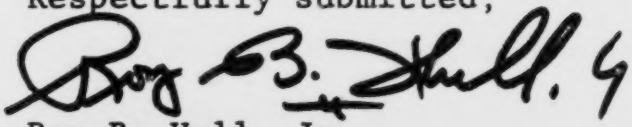
The prosecution crossed a lot of guide lines to cause that guilty verdict to be delivered, to Sgt. Hull. It almost seemed as his very job depended on winning.

Well Victor Roberts, III can not be held totally responsible, when he is kept in fear and guided by an Assistant U.S. Attorney, that is trained to know better.

With the facts presented herein, who could not in good faith, say the jury if told these important facts, about the key witness, would gave another verdict?

DATED: August 31, 1984

Respectfully submitted,



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Telephone: (304) 263-8847

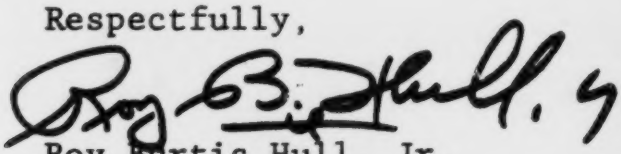
Petitioner, Pro Se

PRO SE OATH

I, Roy Burtis Hull, Jr., SSAN NO: 223-60-5901, do solemnly swear (or affirm) that as a Petitioner of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States of America

Dated: August 31, 1984.

Respectfully,



Roy Burtis Hull, Jr.